Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–28 OF 1996
AUGUSTINE PAUL JC
27 MARCH 1998

Contract *— Time — Completion date — Completion date fell on Sunday — Whether plaintiff needed co-operation of another person to complete his part of the promise to discount Sunday in plaintiff's favour — Whether plaintiff must perform promise on the agreed day — Whether performance on that day had been dispensed with or excused under the Contracts Act 1950 — Whether plaintiff ought to have been able, ready and willing to complete the agreement on that day — Contracts Act 1950 ss 38(1), 40, 41, 48, 51, 52 & 56 — Interpretation Acts 1948 & 1967 s 105(b)*

Contract *— Breach — Time of essence — Purchasers tendered cheque for balance of purchase price on Sunday as agreed to vendor's solicitors — Office of vendor's solicitors closed on Sunday — Whether purchaser in breach — Whether vendor's notice of termination was invalid — Contracts Act 1950 ss 38(1), 40, 41, 48, 51, 52 & 56*

The plaintiff — a co-proprietor of a piece of land ('the land') — agreed via a sale and purchase agreement dated 20 January 1996 ('the agreement') to sell her undivided share in the land to the first defendant company. The second defendants were the solicitors for the first defendant. The agreement provided that time shall be of the essence of the contract. A 10% deposit was paid. The balance of the purchase price was to be paid within three months, with an extension of one month on payment of interest. The plaintiff granted the one-month extension. In her solicitors' letter dated 25 April 1996, the first defendant was warned that if the balance of the purchase price was not deposited with the plaintiff's solicitors on or before 19 May 1996, the plaintiff would terminate the agreement and forfeit the deposit as liquidated damages. 19 May 1996 was a Sunday and 20 May 1996 was a public holiday.

On 19 May 1996, the second defendant's clerk attempted payment on the plaintiff's solicitors but found their office closed. The second defendant immediately notified the plaintiff's solicitors of that fact. In reply to that letter, a solicitor of the plaintiff faxed a letter dated 21 May 1996 at 6.46pm notifying the second defendants that in view of the first defendant's breach of the agreement, they (solicitors for the plaintiff) were awaiting their client's instructions confirming acceptance of the payment of the balance of the purchase price. On 23 May 1996, the plaintiff's solicitors faxed a letter of termination of the agreement to the second defendants and proceeded to forfeit the deposit. The second defendants delivered a cheque for the balance of the purchase price on 24 May 1996 which was returned by the plaintiff's solicitors together with a second letter of termination. Meanwhile, the whole of the land was transferred to the first defendant and a charge was registered in favour of a finance company. The plaintiff commenced proceedings against the two defendants for,

inter alia, an order that the first defendant re-transfer to her the undivided share in the land and damages. The first defendant counterclaimed for damages. The issue was whether when time was of the essence of a contract and the completion date falls on a Sunday, that date ought to be excluded in calculating the date of completion.

Held, dismissing the plaintiff's claim with costs and dismissing the first defendant company's counterclaim with costs:

(1) A promise must be performed at the time agreed by the parties. Section 48 of the Contracts Act 1950 ('the Act') — which provides that the promise may be performed during the usual hours of business of the day — is inapplicable in the case of a promisee who has no hours of business. Such a promisee must perform on the agreed day with no qualification as to the time of the day for performance unless he needs the co-operation of another person to complete the promise and that other person has no hours of business on that day. On the facts of this case, there was no statutory provision or evidence of any hours of business or that the plaintiff needed the co-operation of another person to complete the promise to discount Sunday in favour of her. Thus following s 38(1) of the Act, the plaintiff must perform her promise on the agreed day as the performance had not been dispensed with or excused under the Act or by any other law. The result was that she ought to have been able, ready and willing to complete the agreement on 19 May 1996 (see pp 130I, 132D–E, I and 133A).

(2) The letter dated 25 April 1996 from the plaintiff's solicitors to the second defendants showed that the plaintiff had instructed her solicitors to receive the balance of the purchase price on or before 19 May 1996. The solicitors were therefore duty-bound to make themselves available at the relevant time to ensure that the contract was completed in accordance with the duty of the plaintiff which they had taken over. The fact that they were closed on that day and were therefore unable to complete the agreement was a matter between them and the plaintiff. So long as the defendants were ready, willing and able to complete the agreement on that day they were absolved from any fault. The corollary was that the solicitors appointed by the plaintiff ought to have been available on Sunday 19 May 1996 to complete the agreement and the question of extension of the date did not arise (see p 134A–F).

It thus followed that the default in completing the agreement was caused by the plaintiff. The result was that time was no longer of the essence of the agreement and the plaintiff must give reasonable notice in order to make time of the essence. In such circumstances, the giving of the instant notice of termination by the plaintiff's solicitors pursuant to their letter dated 23 May 1996 was invalid. As the defendants were and still are willing to

A complete the agreement, the plaintiff ought to have allowed them to do so. This was in accordance with s 40 of the Act (see p 135D–E).

Obiter:

B (1) As the computation of time in this case did not involve any written law, s 105(b) of the Interpretation Acts 1948 and 1967 was inapplicable. It was therefore necessary to refer to the Act for guidance (see p 127E–F).

(2) Even if it could be successfully argued that the defendants did C not in fact attempt to complete the agreement on 19 May 1996, that did not advance the plaintiff's case in any way. A party who claims to have rescinded for the other party's failure to meet an essential time bears the onus of proving that he himself was ready, willing and able to meet it. A party to a contract could never in law rely on the non-performance of a promise by the D other party when he himself had waived performance. As the plaintiff was not ready and willing to perform his promise, the first defendant need not perform his promise. This accords with s 52 of the Act. Furthermore, the fact that the plaintiff's solicitors refrained from replying to the second defendant's letter dated E 21 May 1996 in time so as not to give the defendants time to pay showed their unwillingness to complete the contract and this justified intervention by the court in the exercise of its equitable jurisdiction to grant relief against forfeiture (see p 135F–I).

F **[Bahasa Malaysia summary**

Plaintif — tuan punya bersama sebidang tanah ('tanah tersebut') — telah bersetuju melalui satu perjanjian jualbeli bertarikh 20 Januari 1996 ('perjanjian tersebut') untuk menjual bahgian beliau yang tidak berbahagi dalam tanah tersebut kepada syarikat defendan. Defendan- G defendan kedua merupakan peguamcara bagi pihak defendan pertama. Perjanjian tersebut memperuntukan bahawa masa adalah intipati kontrak tersebut. Deposit sebanyak 10% telah dibayar. Baki harga belian hendaklah dibayar dalam tempoh tiga bulan, dengan satu lanjutan selama satu bulan di atas pembayaran faedah. Plaintif telah memberikan tempoh lanjutan selama satu bulan itu. Dalam surat H peguamcaranya bertarikh 25 April 1996, defendan pertama telah diberi amaran bahawa jika baki harga belian tersebut tidak didepositkan dengan peguamcara plaintif pada atau sebelum 19 Mei 1996, plaintif akan menamatkan perjanjian tersebut dan melucuthakkan deposit tersebut sebagai gantirugi jumlah tertentu. 19 Mei 1996 adalah hari I Ahad dan 20 Mei 1996 pula adalah hari cuti awam.

Pada 19 Mei 1996, kerani defendan kedua telah cuba untuk membuat pembayaran kepada peguamcara plaintif tetapi mendapati pejabat mereka tutup. Defendan kedua dengan segera telah memaklumkan peguamcara plaintif mengenai fakta itu. Bagi menjawab

surat tersebut, peguamcara plaintif telah mengirimkan surat melalui faks bertarikh 21 Mei 1996 pada jam 6.46 petang memaklumkan defendan-defendan kedua bahawa memandangkan kemungkiran defendan pertama terhadap perjanjian tersebut, mereka (peguamcara bagi pihak plaintif) sedang menunggu arahan anak guaman mereka yang mengesahkan penerimaan pembayaran baki harga belian. Pada 23 Mei 1996, peguamcara plaintif telah mengirimkan surat penamatan perjanjian tersebut melalui faks kepada defendan-defendan kedua dan terus melucuthak deposit tersebut. Defendan-defendan kedua telah mengirimkan sekeping cek bagi jumlah baki harga belian tersebut pada 24 Mei 1996 yang mana telah dikembalikan oleh peguamcara plaintif bersama-sama dengan surat penamatan yang kedua. Sementara itu, keseluruhan tanah tersebut telah dipindahkan kepada defendan pertama dan satu gadaian telah didaftarkan atas nama sebuah syarikat kewangan. Plaintif telah memulakan prosiding terhadap kedua-dua defendan tersebut untuk mendapatkan, antara lainnya, satu perintah supaya defendan pertama memindahkan semula kepada beliau bahagian yang belum dibahagikan dalam tanah tersebut dan ganti rugi. Defendan pertama telah menuntut balas bagi mendapatkan ganti rugi. Isu tersebut adalah sama ada apabila masa merupakan intipati sesebuah kontrak dan tarikh penyiapan jatuh pada hari Ahad, tarikh itu seharusnya tidak dimasukkan dalam menghitung tarikh penyelesaian.

Diputuskan, menolak tuntutan plaintif dengan kos dan menolak tuntutan balas syarikat defendan pertama dengan kos:

(1) Sesuatu janji haruslah ditepati pada waktu yang dipersetujui oleh pihak-pihak tersebut. Seksyen 48 Akta Kontrak 1950 ('Akta tersebut') — yang mana memperuntukan bahawa janji boleh dilaksanakan pada waktu perniagaan hari tersebut — ia tidak terpakai dalam keadaan penerima janji yang tidak mempunyai waktu urusan perniagaan. Penerima janji yang sedemikian mestilah melaksanakannya pada hari yang dipersetujui tanpa memperhitungkan masa atau hari untuk perlaksanaan melainkan beliau memerlukan kerjasama seseorang yang lain untuk menjadikan janji itu sempurna dan orang yang lain itu tidak mempunyai waktu perniagaan pada hari itu. Menurut fakta-fakta kes ini, tidak terdapat peruntukan berkanun atau keterangan mengenai sebarang waktu perniagaan atau bahawa plaintif memerlukan kerjasamana seseorang yang lain untuk menjadikan sempurna janji tersebut bagi mendiskaunkan hari Ahad yang memihak kepadanya. Dengan itu, berikutan dengan s 38(1) Akta tersebut, plaintif haruslah memenuhi janjinya pada hari yang dipersetujui kerana perlaksanaan tersebut masih belum dilaksanakan atau dikecualikan di bawah Akta tersebut atau melalui mana-mana undang-undang yang lain. Hasilnya adalah bahawa beliau seharusnya dapat, bersedia dan rela untuk menyiapkan perjanjian tersebut pada 19 Mei 1996 (lihat ms 130I, 132D–E, I dan 133A).

(2) Surat bertarikh 25 April 1996 daripada peguamcara plaintif kepada defendan kedua menunjukkan bahawa plaintif telah mengarahkan peguamcaranya untuk menerima baki harga belian pada atau sebelum 19 Mei 1996. Peguamcara dengan itu adalah terikat oleh kewajipan untuk mengadakan diri mereka pada waktu yang relevan bagi memastikan bahawa kontrak itu sempurna menurut kewajipan plaintif yang mana mereka telah mengambil alih. Hakikat bahawa mereka tutup pada hari itu dan dengan itu tidak dapat menyempurnakan perjanjian tersebut adalah suatu perkara antara mereka dan plaintif. Asalkan defendan-defendan bersedia, dapat serta rela untuk menyempurnakan perjanjian tersebut pada hari itu, mereka adalah bebas daripada sebarang kesalahan. Kesimpulannya adalah bahawa peguamcara yang dilantik oleh plaintif seharusnya ada pada hari Ahad bersamaan 19 Mei 1996 untuk menyempurnakan perjanjian tersebut dan persoalan lanjutan tarikh tidak berbangkit (lihat ms 134A–F).

Dengan itu, didapati bahawa kemungkiran dalam menyempurnakan perjanjian tersebut telah disebabkan oleh plaintif. Hasilnya adalah bahawa masa tidak lagi menjadi intipati perjanjian tersebut dan plaintif seharusnya memberikan notis yang wajar bagi menjadikan masa itu intipati. Dalam keadaan yang sedemikian, pemberian notis penamatan semasa ini oleh peguamcara plaintif selaras dengan surat mereka bertarikh 23 Mei 1996 adalah tak sah. Oleh kerana defendan-defendan telah dan masih bersedia untuk menyempurnakan perjanjian tersebut, plaintif seharusnya telah membenarkan mereka melakukan sedemikian. Ini adalah menurut s 40 Akta tersebut (lihat ms 135D–E).

Obiter:

(1) Oleh kerana pengiraan masa dalam kes ini tidak melibatkan mana-mana undang-undang bertulis, s 105(b) Akta Pentafsiran 1948 dan 1967 adalah tidak terpakai (lihat ms 127E–F).

(2) Walaupun jika boleh dihujahkan dengan jayanya bahawa defendan telah tidak pada hakikatnya cuba untuk menyempurnakan perjanjian tersebut pada 19 Mei 1996, hal itu tidak mendahulukan kes plaintif di sisi undang-undang. Sesuatu pihak yang menuntut telah membatalkan kontrak kerana kegagalan pihak yang lain untuk mematuhi masa yang penting menanggung bebanan bagi membuktikan bahawa dia sendiri bersedia, rela dan dapat memenuhinya. Sesuatu pihak kepada sesebuah kontrak tidak boleh di sisi undang-undang bergantung pada ketidak-laksanaan sesuatu janji oleh pihak yang lain sedangkan beliau sendiri telah mengenepikan perlaksanaan. Oleh kerana pihak tersebut tidak bersedia dan tidak rela untuk melaksanakan janjinya, defendan pertama tidak perlu melaksanakan janjinya. Ini berkaitan dengan s 52 Akta tersebut. Lagipun, hakikat bahawa peguamcara plaintif

enggan untuk menjawab surat defendan kedua bertarikh 21 Mei 1996 dalam lingkungan masanya hingga tidak memberikan defendan masa untuk membayar menunjukkan ketidak-relaan mereka untuk menyempurnakan kontrak tersebut dan ini mewajarkan pencelahan oleh mahkamah dalam melaksanakan budibicaranya yang saksama bagi memberikan relief terhadap perlucuthakan (lihat ms 135F–I).]

Notes

For cases on breach due to failure to adhere to time stipulation, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1680–1683.

For cases on time stipulation in a contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3095–3117.

Cases referred to

Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan [1983] 1 WLR 195 (refd)

Apatu v Peach Prescott & Jamieson [1985] 1 NZLR 50 (refd)

Ashbury Railway Carriage and Iron Co v Riche (1875) LR 7 HL 653 (refd)

Buckland & Ors v Farmer & Moody (a firm) [1978] 3 All ER 929 (refd)

Butler v Knight (1867) LR 2 Ex 109 (refd)

Cartwright v MacCormack [1963] 1 WLR 18 (refd)

Cassaboglou v Gibb & Ors (1882–83) 11 QBD 797 (refd)

Cornfoot v Royal Exchange Assurance Corp [1904] 1 KB 40 (refd)

Fray v Voules (1859) 1 E & E 839 (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290 (refd)

Goh Hooi Yin v Lim Tong Ghee [1990] 3 MLJ 23 (refd)

Hermione, The [1922] P 162 (refd)

Hughes v Griffiths (1862) 13 CBNS 324 (refd)

Ismail bin Haji Embong v Lau Kong Han [1970] 2 MLJ 213 (refd)

Jamshed Khodaram Irani v Burjorji Dunjibhai (1916) LR 43 1A 26 (refd)

Kasiram v Hurnundroy AIR 1921 Cal 809 (refd)

Katy, The [1895] P 56 (refd)

Lalchand Balkissan v John L Kersten (1890) 15 Bom 338 (refd)

Lombard North Central plc v Butterworth [1987] 1 QB 527 (refd)

M'Vean v Jameson (1896) 23 R (J) 25 (refd)

Michael Realty Pty Ltd v Carr (1975) 2 NSWLR 812 (refd)

Montreal Assurance Co v McGillivray (1859) 13 Moo PCC 87 (refd)

Moorwell Buildings Ltd v Barr [1956] 1 Ch 551 (refd)

Motumal v Ruttanji 24 IC 883 (refd)

Ng Teck Joo, Peter v Ponniah, Vincent [1985] 2 MLJ 146 (refd)

Norwich and Peterborough Building Society v Steed [1993] Ch 116 (refd)

Palmer v Lark [1945] 1 Ch 182 (refd)

Petrie v Dwyer (1954) 91 CLR 99 (refd)

Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat [1992] 2 MLJ 68 (refd)
Pritam Kaur (Administratrix of Bikar Singh (deceased)) v S Russell & Sons Ltd [1973] 1 All ER 617 (refd)
Quah Ban Poh v Dragon Garden Pte Ltd [1985] 2 MLJ 159 (refd)
S Aiyadurai v Lim Hye [1959] MLJ 143 (refd)
Shrewsbury & Birmingham Rly Co v North Western Rly Co (1857) 6 HL Cas 113 (refd)
Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd [1979] 2 MLJ 190 (refd)
Steedman v Drinkle & Anor [1916] 1 AC 275 (refd)
Stewart v Reavell's Garage [1952] 2 QB 545 (refd)
Strong v Stringer (1889) 61 LT 470 (refd)
Tan Ah Kian v Haji Hasnan [1962] MLJ 400 (refd)
Union Eagle Ltd v Golden Achievement Ltd [1997] 2 All ER 215 (refd)
Xavier Kang Yoon Mook v Insun Development Sdn Bhd [1995] 2 CLJ 471 (refd)
Yap Hong Too & Anor v Wong Ah Mei & Anor [1997] 1 MLJ 545 (refd)

Legislation referred to

Contracts Act 1950 ss 38, 40, 41, 48, 51, 52, 56
Interpretation Acts 1948 and 1967 s 105(b)

Franklin Goonting (*Lim Soh & Goonting*) for the plaintiff.
Wong Kim Fatt (*Michael Tan* with him) (*Tan Lip Yip & Co*) for the first defendant.
Wong Kim Fatt (*Ravi Muthiah & Co*) for the second defendant.

Augustine Paul JC: When time is of the essence in a sale and purchase agreement and the completion date falls on a Sunday, is that day to be excluded in computing the date of completion of the agreement? The answer to this question will determine the outcome of this proceeding before me.

The plaintiff was one of 37 co-proprietors of a piece of land known as Lot 579 held under Grant No 2958 (now Geran No 16359), Mukim Ayer Panas, Daerah Jasin, Malacca. By a sale and purchase agreement dated 20 January 1996 ('the agreement'), she agreed to sell her $^{11,742}/_{335,540}$ undivided shares therein to the first defendant for a sum of RM245,407.80. Clause 19 of the agreement provides that:

> Time whenever mentioned shall in all respects be of the essence of the contract.

Upon execution of the agreement, the first defendant paid the plaintiff a deposit of RM24,540.78. With regard to payment of the balance, the Second Schedule to the agreement provides that:

> The balance of the purchase price of Ringgit Malaysia TWO HUNDRED TWENTY THOUSAND EIGHT HUNDRED AND SIXTY SEVEN AND

> CENTS TWO (RM220,867.02) only shall be paid by the Purchaser to the Vendor within three (3) months from the date of this Agreement with an extension of one (1) month subject to interest payable at the rate of 10% per annum calculated on a day to day basis on the sum remaining unpaid.

Clause 9 of the agreement deals with the power of the plaintiff to terminate it if the first defendant fails to pay the balance of the purchase price. It is in the following terms:

> In the event that the Purchaser fails to pay the balance of the purchase price as stipulated in the Third Schedule hereto the Vendor is entitled to terminate this Agreement and upon such an event, all monies paid to the Vendor by the Purchaser or 10% of the purchase price whichever is the lower shall be forfeited and treated as agreed liquidated damages to the Vendor absolutely and the balance thereof (if any) shall forthwith be refunded to the Purchaser by the Vendor without interest and thereafter neither party shall have further claims against each other.

The second defendant, in its capacity as solicitors for the first defendant, sought an extension of time to complete the agreement by its letter dated 23 April 1996, the material part of which reads as follows:

> Kindly be notified that we have been instructed to request for an extension of time of one (1) month subject to interest payable at the agreed rate of 10% pa calculated on daily basis to complete the above Sale and Purchase. We have been informed by our client that our client's loan has been approved, and pending release.

Messrs Lim Soh & Goonting, solicitors for the plaintiff by their letter dated 25 April 1996 in granting the extension of time, notified the defendants of the last date for completion. The material parts of the letter read as follows:

> Our client is agreeable to grant your client an extension of time of one (1) month until 19 May 1996 to complete the above sale transaction subject to your client paying interest at the rate of 10% pa calculated on a daily basis on the outstanding balance purchase price.
>
> TAKE NOTICE that in the event the balance purchase price amounting to RM220,867.02 and late payment interest accrued thereon are not deposited with us within the completion period, ie on or before 19 May 1996, our client shall invoke cl 9 of the Sale and Purchase Agreement dated 20 January 1996 whereby the said agreement shall be terminated and the 10% deposit shall be forfeited and treated as liquidated damages.

I interpolate to add that 19 May 1996 was a Sunday and the following day, Monday 20 May 1996, was a public holiday.

Lim Su Heng (DW1), an officer from the first defendant, handed over the cheque for the balance of the purchase price to Ravinathan Muthiah (DW3), the sole proprietor of the second defendant in Melaka on 18 May 1996. DW3 handed the cheque and a covering letter to his clerk Pradeep Kumar (DW2) on the same day with instructions to deliver them to the plaintiff's solicitors on 19 May 1996. The material parts of the covering letter read as follows:

> We refer to the above matter and your letter dated 25 April 1996.

> We are pleased to forward herewith our client's Hong Leong Bank Bhd Cheque No 276693 dated 19 May 1996 for the balance purchase price and interest, for the amount of RM224,548.14 issued in favour of your goodselves.
>
> Kindly acknowledge receipt by signing and returning the copy of this letter to bearer hereof.

On 19 May 1996, DW2 went to the office of the plaintiff's solicitors to effect the payment. However, he found that their office was closed. He then returned and informed DW3 about it on 21 May 1996. DW3 immediately faxed a letter to the plaintiff's solicitors in the following terms:

> We refer to the above and your letter dated 25 April 1996.
>
> We wish to inform you that as per your said letter, our clerk called over at your office with our client's cheque for the balance of the purchase price and interest on 19 May 1996 at about 2pm, but there was no one present to accept the said cheque.
>
> In the circumstances we hereby notify you that our clerk shall be calling over at your office on 24 May 1996 to deposit the said cheque with your goodselves.
>
> Kindly be present to accept the same.

Upon receipt of this letter, Soh Siew Chiang (PW2), a solicitor from the plaintiff's solicitors' firm, faxed a reply on the same day to the second defendant saying that the date of completion should be 21 May 1996 by virtue of the previous two days having been holidays. The material parts of the letter read as follows:

> We refer to your faxed letter dated 21 May 1996 which was received by us at about 1.10 pm today.
>
> As you are aware, 19 May 1996 was a Sunday and 20 May 1996 was a public holiday, therefore the extended completion date should be on 21 May 1996.
>
> As the balance purchase price is not received by us today, your clients are in fact in breach of cl 3 in particular the Third Schedule (b) of the Sale and Purchase Agreement dated 20 January 1996.
>
> In the circumstances, we are awaiting our client's written instructions confirming acceptance of your payment notwithstanding the said breach by your clients.

It is of interest to note that this letter was faxed at 6.46 pm. When asked why he sent the letter late, PW2 said:

> I agree that I sent the fax late so as not to give the defendant time to pay.

Upon being asked by his counsel to clarify this statement, PW2 said:

> What I said in cross-examination that I agree that the fax was sent late so as not to give the defendant time to pay is not true.

On 23 May 1996, the plaintiff's solicitors informed the second defendant by letter that the agreement is terminated and that the deposit of 10% is forfeited as liquidated damages. On 24 May 1996, DW2 delivered the cheque for the balance of the purchase price to the plaintiff's solicitors who received it without prejudice. On the same day, the plaintiff's solicitors

sent a second letter of termination to the second defendant and returned the cheque. Meanwhile, the whole of Lot 579 had been transferred into the name of the first defendant and a charge on the land was registered in favour of Southern Finance Company Bhd. This led the plaintiff to commence proceedings against the two defendants for, inter alia, an order that the first defendant retransfer the plaintiffs land to her and for damages. It is pertinent to reproduce paras 6 and 10 of the statement of claim (as translated):

> Paragraph 6
>
> The last day by which the balance of the purchase price was to be paid was 19 May 1996.
>
> Paragraph 10
>
> The first defendants failed to pay the said balance of the purchase price by 19 May 1996 aforesaid and only purported to make payment of the same by cheque vide a covering letter dated 23 May 1996 which reached the plaintiff's solicitors M/s Lim Soh & Goonting on 24 May 1996.

In substance, the defence of the defendants is that they are not in breach of the agreement and accordingly counterclaimed for damages.

I shall first advert to some general principles of law governing the effect of a contract where time is of the essence. A sale and purchase agreement is a contract. Generally stated, a contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing. A statement in a contract that time is 'of the essence' of the contract will be sufficient to express an intention to make the time stipulation to which it applies a condition (see *Steedman v Drinkle & Anor* [1916] 1 AC 275; *Petrie v Dwyer* (1954) 91 CLR 99; *Lombard North Central plc v Butterworth* [1987] 1 QB 527). The condition is of primary importance and the time stipulation must be adhered to (see *Ng Teck Joo, Peter v Ponniah, Vincent* [1985] 2 MLJ 146). Where there is such a condition in a sale agreement the vendor must be able, ready and willing to proceed to completion as agreed (see *Moorwell Buildings Ltd v Barr* [1956] 1 Ch 551). The breach of the condition relating to time by one party will entitle the other party to have an option of treating the agreement either as having been repudiated and sue for damages or as still subsisting (see *Xavier Kang Yoon Mook v Insun Development Sdn Bhd* [1995] 2 CLJ 471). Accordingly, where a time for completion is of the essence, whether by virtue of the contract or of a notice, failure by either party to complete punctually will give rise immediately to a right of rescission in the other only if the latter tendered completion except to the extent of any waiver (see *Palmer v Lark* [1945] 1 Ch 182; *Michael Realty Pty Ltd v Carr* [1975] 2 NSWLR 812). In *Union Eagle Ltd v Golden Achievement Ltd* [1997] 2 All ER 215, the Privy Council held that even a delay of 10 minutes after the time for completion has passed amounted to a breach of contract. It must be observed that if a vendor has once made time of the essence of the contract and then allows an extension of time to a fixed date, the time remains essential (see *Buckland & Ors v Farmer & Moody (a firm)* [1978]

3 All ER 929; *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). Do these principles of law exclude Sundays and public holidays when the last day for completion of an agreement falls on such days?

The answer to the question just posed will have a critical effect on the outcome of this action. In their submission, the defendants did not make any specific reference to this issue but maintained that the last day to pay the balance of the purchase price was 19 May 1996 as agreed and as pleaded by the plaintiff in her statement of claim. In support of this argument, they referred to the letter dated 25 April 1996 from the plaintiff's solicitors which required the sum due to be paid '... on or before 19 May 1996 ...'. In reply, the plaintiff referred to 45 *Halsbury's Laws of England* (4th Ed) para 1138 which reads as follows:

> The fact that the last date of a prescribed period is a Sunday, or other non-juridical day, does not as a general rule, give the person who is called upon to act an extra day, it is no excuse for his omission to do the act on some prior day.
>
> This general rule does not, however, hold good where the effect of it would be to render performance of the act impossible. This would be the case if the whole of the prescribed period consisted of holidays, in which case the act may lawfully be done on the next possible day.

The starting point for the answer to the problem posed is s 105(b) of our Interpretation Acts 1948 and 1967, which provides that in computing time for the purposes of any written law, unless the contrary intention appears, if the last day of the period is a weekly holiday or a public holiday (which days are referred to as excluded days in the section) the period shall include the next following day not being an excluded day. As the computation of time in this case does not involve any written law, the provision of law that I have just referred to is inapplicable. It is therefore necessary to refer to the Contracts Act 1950 ('the Act') for guidance. Before going into the relevant provisions in the Act regarding this issue, I consider it necessary to analyse the judgment of the English Court of Appeal in *Pritam Kaur (Administratrix of Bikar Singh (deceased)) v S Russell & Sons Ltd* [1973] 1 All ER 617 (per Lord Denning MR, Karminski LJ and Megarry J) in order to distil some guidelines which may be of assistance in resolving the problem in this case. That case is referred to in the footnotes to the passage from *Halsbury's Laws of England* referred to by the plaintiff and explains the significance of the passage relied on. The issue for determination in that case was the manner of computing time under the Limitation Act 1939 for bringing proceedings in court when the last day was a Sunday. In his judgment, Lord Denning MR observed that the period of limitation is prescribed by the statutes and not by rules of court. His Lordship said that if the time period had been prescribed by rules of court, then O 3 r 4 of the Rules of the Supreme Court could be resorted to as it provides that if the court offices are closed, the time is extended until the next day. However, this rule does not apply to cases when the time is prescribed by statute. His Lordship then referred to the arguments of both sides and said at pp 619–620:

> The arguments on each side are evenly balanced. The defendants can say: 'The plaintiff has three years in which to bring his action. If the last day is a Saturday or Sunday, or other dies non, he ought not to leave it until the last day. He ought to make sure and issue it the day before when the offices are open'. The defendants can rely for this view on the reasoning of Russell LJ in *Hodgson v Armstrong & Anor* [1967] 1 All ER 307 at p 320 and the cases to which he refers. The plaintiff can say: 'The statute gives me three years in which I can bring my action. If I go in to the offices on the last day, and find them closed, I ought not to be defeated on that account. I should be allowed to go next day when the offices are open. Otherwise, I should be deprived of the three years which the statute allows me'. The plaintiff can rely for their view on the reasoning of Sellers LJ in *Hodgson v Armstrong* at pp 311 and 312, and the cases to which he refers.

His Lordship said that the arguments were so evenly balanced that a decision could be made either way and concluded at p 620:

> The important thing is to lay down a rule for the future so that people can know how they stand. In laying down a rule, we can look to parallel fields of law to see the rule there. The nearest parallel is the case where a time is prescribed by the rules of court for doing any act. The rule prescribed both in the county court and the High Court is this: if the time expires on a Sunday or any other day on which the court office is closed, the act is done in time if it is done on the next day on which the court office is open. I think we should apply a similar rule when the time is prescribed by statute. By so doing, we make the law consistent in itself; and we avoid confusion to practitioners. So I am prepared to hold that, when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open.

Lord Denning MR based his conclusion on *Hughes v Griffiths* (1862) 13 CBNS 324 where Erle CJ said at p 333:

> Where the act is to be done by the court, and the court refuses to act on that day, the intendment of the law is that the party shall have until the earliest day on which the court will act.

Karminski LJ in agreeing with Lord Denning MR also referred to *Hughes v Griffiths* where Byles J said at p 337:

> Consequently, the seventh day must be one upon which the court can be set in motion; otherwise, the party would not have that which the legislature contemplated that he should have.

Megarry J analysed an array of authorities and concluded at p 626:

> Accordingly, in my judgment the result is as follows. There are a number of cases which support the general rule that a statutory period of time, whether general or special, will, in the absence of any contrary provision, normally be construed as ending at the expiration of the last day of the period. That rule remains; but there is a limited but important exception or qualification to it, which may be derived from a line of authorities which include *Hughes v Griffiths* (1862) 13 CBNS 324, *Mumford v Hitchcocks* (1863) 14 CBNS 361, the judgment of Sellers LJ in *Hodgson v Armstrong* [1967] 1 All ER 307

A and the Scottish cases. If the act to be done by the person concemed is one for which some action by the court is requisite, such as issuing a writ, and it is impossible to do that act on the last day of the period because the offices of the court are closed for the whole of that day, the period will prima facie be construed as ending not on that day but at the expiration of the next day upon which the offices of the court are open and it becomes possible to do B the act. In this appeal, there is nothing in the facts of the case which ousts the prima facie application of this exception, which accordingly applies. I therefore concur in allowing the appeal.

One of the Scottish cases that Megarry J referred to in arriving at his conclusion is *M'Vean v Jameson* (1896) 23 R (J) 25 where Lord M'Laren C said at p 27:

> When some step of judicial procedure has to be performed by the litigant within a definite number of days fixed by statute, and the last day is a Sunday, our decisions have sanctioned the completion of the step on the Monday, where the step is one which requires the co-operation of the clerk of court or other official, as the giving in of a report or document of any kind D ... . *But where the act is something which the litigant can do at his own hand — where he has it in his power to complete the act so far as his own share in it is concerned without the co-operation of a second party, as in the case of the notice required — I see no reason why Sunday should be discounted.* (Emphasis added.)

E What can be discerned from the passages that I have reproduced thus far is that a statutory period of time is normally construed as ending at the expiration of the last day of the period. The exception to the rule arises where the act becomes impossible to be performed on the last day. Such an impossibility will arise where the act requires the action of another party, for example, a court which is closed on the last day being a Sunday. F The exception will not apply to a case where a person can do his share of the act without the co-operation of another party on the last day which is a Sunday. In such circumstances, the Sunday will not be discounted and must be treated as the last day for the performance of the act. As we have a statutory formula for resolving problems of this nature involving any G written law, these principles are not relevant in interpreting our statutes. However, these principles may be relevant in computing time for the performance of a promise in a contract. I shall refer to these principles in a later part of the judgment when dealing with the relevant provisions relating to time in the Act.

H I shall now consider some provisions of the Act which deal with this issue. Section 38(1) of the Act provides that the parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under the Act, or of any other law. Section 56 of the Act regulates the position when time is of the essence of a contract. It reads as follows:

I (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option

of the promisee, if the intention of the parties was that time should be of the essence of the contract. A

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure B

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. C

The law embodied in s 56 of the Act does not differ from the equitable principle under English law relating to time in contracts for the sale of land (see *Jamshed Khodaram Irani v Burjorji Dunjibhai* (1916) LR 43 1A 26; *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290; *Ismail bin Haji Embong v Lau Kong Han* [1970] 2 MLJ 213; *S Aiyadurai v Lim Hye* [1959] MLJ 143). In commenting on this section, Gill J (as he then was) said in *Tan Ah Kian v Haji Hasnan* [1962] MLJ 400 at p 404: D

> These provisions of our law are akin to the distinction in English law between a condition the breach of which entitles the other party to treat himself as discharged from liability under the contract and a warranty which merely gives him a right to damages. The English law is summarized in para 575 of *Chitty on Contracts* (22nd Ed) as follows: E
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> 'Once it has been established that a certain stipulation is indeed a term of the contract, the question arises as to its comparative importance and effect. Contracts are normally made up of a number of terms, some of which may be regarded as of major, and others of minor, importance. In English law, the breach of any term will normally give a right to the injured party to claim damages. But his further remedies will depend upon the importance of the term which has been broken. If the term may be regarded as essential to the undertaking, it is called a condition. The breach of a condition entitles the injured party either: (i) to treat the contract as at an end, in which case the contract is said to be discharged by breach; or (ii) to continue to treat the contract as still binding and to content himself with damages, which are his remedy in any event. If, however, the term is merely subsidiary or collateral to the main undertaking, the breach of it will not entitle him to treat the contract as discharged, but to claim damages only. Such a subsidiary or collateral term is known as a warranty in law.' F G H

Section 51 of the Act provides that the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. The effect of ss 51 and 56 of the Act is that a promise must be performed at the time agreed by the parties. These two sections must be read with s 48 of the Act which reads as follows: I

> When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor

A may perform it at any time during the usual hours of business on the day and at the place at which the promise ought to be performed.

When a promise is to be performed on a certain day this section specifies the time of the day during which the promise may be performed when the promisor has undertaken to perform it without application by the promisee. B Under English common law, a day is a period of time as from midnight to midnight, and not a period of 24 consecutive hours (see *The Katy* [1895] P 56; *Cartwright v MacCormack* [1963] 1 WLR 18), unless it is clear that the latter was intended (see *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 KB 40). Thus when payment has to be made on a specified day, it can, in the absence of any custom to the contrary, be made at any time C up to midnight on that day (see *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan* [1983] 1 WLR 195). With regard to the position of Sundays and public holidays as 'days', *Chitty on Contracts* (27th Ed) Vol 1 says at para 21–019:

D Usually, 'days' include Sundays and holidays, unless there is a custom to the contrary, and this is the meaning of the words 'running days' (*Nielson & Co v Wait, James & Co* (1885) 16 QBD 67); on the other hand, the phrase 'working days' excludes days when work is not ordinarily done and the terms of a contract may show that the word 'day' has this meaning (*Commercial SS Co v Boulton* (1875) LR 10 QB 346; *Nielson v Wait*; *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] AC 691).

E As s 48 of the Act provides that the promise may be performed during the usual hours of business of the day, certain problems relating to its interpretation arise for consideration. Does it refer to the usual business hours of the public service of the community? Does it refer to the usual business hours of the private sector? If so, does it vary according to the F business hours of a particular trade? Does it refer only to the business hours of the promisee? Finally, what is the position if the promisee has no business hours? In my opinion, the clue to the answer to the various questions posed is provided by the illustration to the section which reads as follows:

G A promises to deliver goods at B's warehouse on 1 January. On that day, A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

The illustration makes it manifestly plain that the usual hours of business referred to in the section is a reference only to the usual business hours of H the promisee himself. This is logical as he needs the co-operation and assistance of his own business enterprise, as in the case of the warehouse in the illustration to the section, to perform his promise and not the business hours of some other entity which may have no relevance or assistance to the performance of his promise. The language employed in the section only calls for a determination of the time of the agreed day I during which the promise may be performed. The day on which the promise is to be performed remains as agreed between the parties. Thus if the agreed day is a Sunday or public holiday and the promisee has his business open on those days then such days will not be excluded. They will

of course be excluded if he has no hours of business on those days. As the issue of business hours in the section is peculiar to the promisee himself, it follows that they will not be relevant when a promisee has no such hours. This is logical as such a person will not need the co-operation or assistance of his business enterprise, as there is none, to perform his promise. To hold otherwise would mean that a person who has no business hours will be unable to perform a promise made by him. Similarly, to equate him with some non-existent hours of business will be artificial and produce absurd results. It must be remembered that one of the fundamental principles of statutory interpretation is to avoid such consequences. In this regard, *Bennion on Statutory Interpretation* (2nd Ed) says this at p 679:

> The court seeks to avoid a construction that produces an absurd result since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

The corollary is that s 48 of the Act is inapplicable in the case of a person with no hours of business. The promise must be performed on the agreed day with no qualification as to the time of the day for the performance of the promise. It follows that Sundays and public holidays will not be discounted. However, the position may be different if he needs the co-operation of another person to complete the promise and that other person has no hours of business on that day. In that event, that day may be excluded. This interpretation of s 48 of the Act is in harmony with the common law principles that I discussed in an earlier part of the judgment as to when a Sunday can and cannot be discounted. Some Indian decisions are in support of this line of thinking. In *Kasiram v Hurnundroy* AIR 1921 Cal 809, it was held that in the absence of any statutory provision or a trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. If, according to the statutory provision or usage, the contract cannot be performed on the holiday, it may be performed on the next opening day. *Lalchand Balkissan v John L Kersten* (1890) 15 Bom 338 was a case involving a suit for damages against the defendant, a German, for non-delivery of goods. It was contended that he was not bound to deliver the goods on Sunday, which was the last day named in the contract for performance. It was held that the 'Lords Day Act' did not apply to India, and that in the absence of a custom to the contrary, he was bound to deliver the goods on that day if they had not already been delivered. In *Motumal v Ruttanji* 24 IC 883, it was held that according to the custom of Calcutta merchants, delivery is to be completed on Saturday if it falls on Sunday. On the facts of this case, there is no statutory provision or evidence of any hours of business or that the plaintiff needs the co-operation of another person to complete the promise to discount Sunday in favour of her. Thus following s 38(1) of the Act, the plaintiff must perform her promise on the agreed day as the performance has not been dispensed with or excused under the Act or by any other law.

A The result is that she ought to have been able, ready and willing to complete the agreement on 19 May 1996. That leads rise to a consideration of the position when the plaintiff has appointed an agent to perform the promise on her behalf and the agent has his own hours of business which do not include Sundays.

B It is significant to observe that the primary responsibility in completing the agreement is on the plaintiff herself. This is because the parties have agreed in the Second Schedule to the agreement that the balance of the purchase price '... shall be paid by the Purchaser to the Vendor ...'. That, of course, does not preclude the plaintiff from appointing an agent to act on her behalf in accordance with s 41 of the Act. However, any agent C whom the plaintiff appoints must also be ready, willing and able to complete the contract as agreed between the parties. In this regard, *Chitty on Contracts* (27th Ed) Vol I says at para 19–046:

> A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he D is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. The contracting party will, however, be liable for any breach that may happen, and the other contracting party is not bound or, indeed, entitled to sue the substituted person for breach of contract, although there may, of course, be a remedy in tort, eg E where the substituted person negligently damages or causes the loss of goods entrusted to him. This is technically known as vicarious performance, and it is 'quite a mistake to regard that as an assignment of the contract; it is not' (*Davies v Collins* [1945] 1 All ER 247).

The rationale for the relationship between a principal and an agent is F anchored on the premise that the agent is merely standing in the principal's shoes and is not entitled to any special right, privilege or immunity not enjoyed by the latter. Where a person performs a contract through an agent, he remains liable personally (see *Stewart v Reavell's Garage* [1952] 2 QB 545). It is settled law that in no case can the authority of an agent exceed the power of the principal to act on his own behalf (see *Shrewsbury* G *& Birmingham Rly Co v North Western Rly Co* (1857) 6 HL Cas 113; *Montreal Assurance Co v McGillivray* (1859) 13 Moo PCC 87; *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653). An agent is a mere instrument and it is the principal who bears the risk of inadequate representation (see *Norwich and Peterborough Building Society v Steed* [1993] Ch 116). The agent must comply strictly with the terms of what he has H agreed to do, and is in breach of contract if he exceeds his authority on the one hand, or fails to carry it out on the other (see *Fray v Voules* (1859) 1 E & E 839; *Butler v Knight* (1867) LR 2 Ex 109; *The Hermione* [1922] P 162; *Apatu v Peach Prescott & Jamieson* [1985] 1 NZLR 50). It is the duty of an agent to carry out the business he has undertaken and he I must inform his principal promptly if it is impossible to do so (see *Cassaboglou v Gibb & Ors* (1882–83) 11 QBD 797). Where an agent is employed to carry out any transaction which involves a payment to him on his principal's behalf, he must not compromise his principal's rights (see 45 *Halsbury's Laws of England* (4th Ed) para 783).

The letter dated 25 April 1996 from the plaintiff's solicitors to the second defendant shows that the plaintiff had instructed her solicitors to receive the balance of the purchase price. The letter spells out in clear and crystalline terms that if the sum due is not deposited with the solicitors within the completion period — that is to say, on or before 19 May 1996 — the agreement shall be terminated. Thus the instruction of the plaintiff to her solicitors is that the sum due should be received on or before 19 May 1996 as stipulated by the agreement. There is therefore no change in the time of performance of the agreement which is a condition by virtue of time being of the essence of the agreement and which, in any event, cannot be altered unilaterally. The change is only as to the place of performance of the agreement. The solicitors are therefore duty-bound to make themselves available at the relevant time to ensure that the contract is completed in accordance with the duty of the plaintiff which they have taken over. Any attempt by them to have this date varied for whatever reason bearing in mind the fact that there is no legal impediment to their client completing the agreement on 19 May 1996 is a violation of the express terms of the agreement thereby resulting in the plaintiff being in breach of the agreement. Thus their inability to complete the agreement by virtue of their office being closed at the material time has to be considered as the default of the plaintiff in completing the agreement as they were her lawfully appointed agents and as there was no change as to the time of performance of the agreement. The fact that they were closed on that day and were therefore unable to complete the agreement is a matter between them and the plaintiff. So long as the defendants were ready, willing and able to complete the agreement on that day they are absolved from any fault. The corollary is that the solicitors appointed by the plaintiff ought to have been available on Sunday 19 May 1996 to complete the agreement and the question of extension of the date does not arise. In the premises, it is my view that the completion date of the agreement in this case is Sunday 19 May 1996. That, incidentally, is precisely what the plaintiff herself has pleaded in her statement of claim. I interpolate to add that the position may warrant different consideration if the agreement itself had provided that the balance of the purchase price is to be paid to the 'vendor's solicitors'. In that event, the closure of the solicitor's office on the days in question may require to be taken into account. Notwithstanding the views that I have expressed, the fact that the plaintiff's solicitors have by their letter dated 25 April 1996 demanded the balance of the purchase price to be deposited '... within the completion period, ie 19 May 1996 ...' is a specific direction and includes 19 May 1996 by the expression of a contrary intention even if that day is to be excluded on general principles.

What now requires consideration is whether the defendants attempted to complete the agreement on the stipulated day. It is my firm finding of fact, based on the evidence adduced and the demeanour of the witnesses while giving evidence, that the second defendant did in fact attempt to pay the balance of the purchase price to the solicitors for the plaintiff on 19 May 1996. Contrary to the assertion of the plaintiff, it is my view that the covering letter dated 18 May 1996 taken by DW2 to the office of the

plaintiff's solicitors is not a fabrication. DW2 confirmed the evidence of DW3 on the authenticity of this letter. Additionally, the letter dated 21 May 1996 from DW3 to the plaintiff's solicitors further confirms the defence's version of the sequence of events. The conduct of the plaintiff's solicitors upon receipt of this letter leaves much to be desired and lends weight to the case for the defendants. If the solicitors for the plaintiff genuinely believed that the completion date had in fact been extended to 21 May 1996, they ought to have given an immediate reply to the second defendant's letter dated 21 May 1996 bearing in mind the fact that the letter speaks of the attempt made on 19 May 1996 to effect the payment following the intimation in their letter dated 25 April 1996 that the date for completion was '... on or before 19 May 1996 ...'. Instead, the plaintiff's solicitors sent the reply late so as not to give the defendants time to pay.

It thus follows that the default in completing the agreement was caused by the plaintiff. The result is that time was no longer of the essence of the agreement and the plaintiff must give reasonable notice in order to make time of the essence (see *Quah Ban Poh v Dragon Garden Pte Ltd* [1985] 2 MLJ 159). In such circumstances, the giving of an instant notice of termination will be unreasonable and invalid (see *Goh Hooi Yin v Lim Tong Ghee* [1990] 3 MLJ 23; *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat* [1992] 2 MLJ 68). Thus the notice of termination given by the plaintiff's solicitors pursuant to their letter dated 23 May 1996 is invalid. As the defendants were and still are willing to complete the agreement, the plaintiff ought to have allowed them to do so. This is in accordance with s 40 of the Act which provides that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Notwithstanding what I have said thus far, even if it can be successfully argued that the defendants did not in fact attempt to complete the agreement on 19 May 1996, that does not advance the plaintiff's case in any way. A party who claims to have rescinded for the other party's failure to meet an essential time bears the onus of proving that he himself was ready, willing and able to meet it (see *Time in the Performance of Contracts* by KE Lindgren (2nd Ed) p 143). A party to a contract can never in law rely on the non-performance of a promise by the other party when he himself had waived performance (see *Strong v Stringer* (1889) 61 LT 470). As the plaintiff was not ready and willing to perform his promise, the first defendant need not perform his promise. This accords with s 52 of the Act which reads as follows:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise, unless the promisee is ready and willing to perform his reciprocal promise.

Furthermore, the fact that the plaintiff's solicitors refrained from replying to the second defendant's letter dated 21 May 1996 in time so as not to give the defendants time to pay shows their unwillingness to complete the contract and this justifies intervention by the court in the exercise of its equitable jurisdiction. In this regard, I refer to *Yap Hong Too & Anor v*

Wong Ah Mei & Anor [1997] 1 MLJ 545 where Peh Swee Chin FCJ said at p 550:

> A court of equity can grant relief against forfeiture when circumstances justify it. Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to court with clean hands, a court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it. ...
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> We find an echo in a relevant passage in *Cheshire, Fifoot & Furmston's Law of Contract* (11th Ed) by Prof Furmston at p 609 as set out below:
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> > 'It is clear at least that equity, where warranted by the circumstances, will relieve the buyer to the extent of giving him further time within which to complete the contract even though the parties have agreed that time shall be essential. In other words, the forfeiture will be suspended, provided that the buyer expresses himself ready and willing to pay the balance of the price within the extended time fixed by the court.'

In the upshot, I dismiss the plaintiff's claim with costs. I also dismiss the first defendant's counterclaim with costs as they have led no evidence in support of their claim. I further order, on a concession made by the defendants, that the first defendant do pay the plaintiff the amount due to her as of 19 May 1996, that is to say, a sum of RM224,548.14 within one month.

Claim dismissed with costs.

Reported by Koay Sook Kuan